No. 11843.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY COMPANY, a Corporation,

Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

REPLY BRIEF FOR THE PACIFIC ELECTRIC RAILWAY COMPANY.

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,
670 Pacific Electric Building, Los Angeles 14,
Attorneys for Appellant and Respondent, Pacific Electric Railway Company.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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REPLY BRIEF FOR THE PACIFIC ELECTRIC RAILWAY COMPANY.

Statements of Facts.

No objection is made to the Statement of the Case contained in the Brief for the United States of America except as expressly mentioned herein.

The Brief, on page 3, states that the materials in question were for ships being constructed under the "United States Maritime Commission's essential War Emergency

Ship Construction program." The Stipulation of Facts referred to the ships as being constructed "for the United States Maritime Commission under the latter's ship construction program." [R. 15.] Many of the ships were constructed under what was known as the Emergency Ship Construction program. Objection to the word "War" in referring to the ship construction program.

Summary of Argument.

As to the materials shipped on bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759, the purchase contracts contained an express provision reserving title in the seller until delivery. Therefore, title was not in the Government at the time of shipment as to these materials. This is true in spite of shipment on Government bill of lading, and to reference on the bill of lading to an f. o. b. shipping point.

Use of a Government bill of lading and reference on the Government bill of lading to "public property" does not result in a transfer of title from the seller of the materials to the Government contrary to the purchase contracts.

In order to be "property of the United States" within the meaning of Section 321(a) of the Transportation Act of 1940, title must be in the United States during shipment. This is a well accepted meaning of the phrase as shown in the construction of these words in land-grant acts for many years.

ARGUMENT.

I.

Title Was Not in the Government at Time of Shipment as to Materials Shipped on Bills of Lading Nos. MC-88579, MC-22992, MC-28270, and MC-34759.

A. By the Express Terms of the Purchase Contracts, Title to These Materials Was Reserved in the Seller Until Delivery.

The Government's argument on this point is in substance that the Court should not consider what the parties actually provided in the contract in determining title, but should look to various collateral matters and infer from those matters directly contrary to the express conditions of the contract. In other words, the Government is attempting to apply to a contract having an express provision as to title rules that might be applicable in the absence of any provision as to title.

It is true that the basic rule of construction of a contract and in determining the question of when title passes, is the intention of the parties.

As stated in Williston on Sales, Second Edition, Volume 1, page 526, Section 261:

> "By intention in this connection is meant in the law of sales as throughout the law governing the formation of contracts, expressed intention."

Later in the same volume at page 596, Section 280, it is stated as to the various presumptions of title:

> "It must, therefore, constantly be borne in mind that the rules here spoken of, like others in the section of the Sales Act under consideration, are rules of presumption merely and will yield to proof of a contrary intention."

Certainly, this intention can best be expressed by the written provisions of the contract itself. In each of the cases involved, the purchase contract expressly reserved the title in the seller until arrival at destination.

On page 15 of the Brief, it is stated that the "District Court called this provision a 'manifest inconsistency'." This is a misstatement of the opinion of the District Court which stated on this point as follows (first referring to contract MCc(ESP)-1520):

> "To the contrary, however, the contract expressly provided that the seller's responsibility for delivery would not terminate until arrival of the material at destination and that: 'Title to all of the products covered by this order will remain in the seller until delivery thereof has been made to the buyer at the destination herein named.'
>
> "Contracts MCc(ESP)-1145, MCc(ESP)-1837 and MCc(ESP)-2690 also provided that all shipments were to be on Government bill of lading, but that title should remain in the seller until delivery at destination.
>
> "The usual *indicia* of intention become immaterial in the face of an express contractual provision reserving title in the seller during shipment.
>
> "The Government urges that the manifest inconsistency of reserving title in the seller and shipping by Government bill of lading is but an 'oversight'. Be that as it may, the law does not permit a court to read out of a contract language expressly reserving title in the seller until delivery at destination."

The Government implies that the inclusion of the provision reserving title was "an oversight." There is nothing in the record which would support such an implication,

and it must certainly be assumed that the parties intended what was provided in the contracts.

The Government on pages 16-19 of its Brief, attempts to show that the purchase contracts as to which the District Court held title was in the Government during shipment were similar to the ones which the District Court held title was not in the Government. Of course, the basic difference is that as to the four shipments as to which the District Court held title was not in the Government, the purchase contracts contained an express provision that title was to remain in the seller until delivery, and the purchase contracts as to the remaining shipments contained no such provision. In all questionable cases, the District Court held for the Government.

The Government concedes (Brief p. 20), as indeed it must, that shipment on a Government bill of lading is merely a presumptive indication of title, but still the Government argues that shipment on Government bill of lading is stronger evidence of title than an express provision of the contract.

The Government further argues that the fact that the Government was to assume responsibility for the transportation charges shows a definite intention on the part of the Government to take title. Although this might be some indication of title in the absence of a specific provision, there is nothing inconsistent between the Government's paying the transportation charges and not taking title until delivery. As a matter of fact, the Government had very little thought of obtaining land-grant rates on shipments for the Maritime Commission until long after all of these shipments were completed. The first real indication on the part of the Government that land-grant rates would be claimed on such shipments was in Decem-

ber, 1942, when the Maritime Commission passed its resolution, which appears on pages 73-74 of the Record. The Government makes a practice of assuming freight charges so that the seller will know what it is to obtain for its merchandise. The Government then assumes the obligation of paying the freight charges whether they are commercial rates or land-grant rates.

The Government makes further reference to a statement made in a preliminary proposal *as to one of the shipments involved,* which provides as follows [R. 28] which is referred to in the Government's Brief, page 6 and page 21:

> "This price is for material shipped to and including September 30, 1941, after which time the price will be the published price at Chicago, Illinois, in effect at the time of shipment, plus the all-rail freight rate to the three destinations."
>
> "If the Government wishes to take possession of this material at our plant and ship on Government Bills of Lading in order to take advantage of land grant freight rates, we will deduct the regular commercial freight rate, which at present is $1.10 per 100 lbs."

It should be noted that the letter mentioned was prior to the contract, and merely contained an alternate proposal which was not itself included in the contract. The mere reference to this letter in the purchase contract would certainly not overcome the express provision of the purchase contract as to title. Reference to the possibility of taking advantage of land-grant freight rates was either through overlooking the amendments contained in Section 321(a) of the Transportation Act of 1940 or not considering that the Maritime Commission was involved. At the time of this proposal not even the Government had any thought

of claiming that land-grant rates applied to shipments for the Maritime Commission.

The Government further makes reference to the provisions on the bill of lading as to "public property" and "f. o. b. point" as being the shipping point. As has been stated, the cases have held that shipment on Government bill of lading is not conclusive as to title of the shipment. The printed form merely refers to "public property." Reference to the f. o. b. point as the point of shipment in the bill of lading is merely some *indicia* of title in the absence of a provision in the contract. The contract having an express provision as to title, this could not determine title.

On page 22 of the Government's Brief, it is stated:

> ". . . It should be emphasized that this bill of lading, with these recitals, was the sole privity between the carrier and the government, which hardly warrants the carriers making claims contrary to its explicit language."

It should be noted that each of the bills of lading in question provided "CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET OUT IN THIS CERTIFICATE." This statement is further answered by the following portion of the opinion in the case of *Oregon-Washington Railroad & Navigation Company v. U. S.*, 65 L. Ed. 667, 255 U. S. 339 at 349, where it was held the railroad was not warranted in relying on a Government bill of lading as indicating that the property shipped was property of the United States:

> ". . . The mere mechanism of the bills of lading, or their false designations of the property transported, could not have imposed on anybody, certainly

> not on 'the auditors and agents' of a railroad company, and the decisions of the Comptroller were as much open to dispute then as now, and resort to suit an inevitable prompting; and yet, we have seen, the Statute of Limitations was permitted to interpose its bar. The excuse of appellant is hard to credit. Its 'auditors and agents' were not ignorant of affairs, nor unpracticed in the controversies of business, and the means of their settlement. The auditors and agents of railroad companies are not usually complaisant to denials of the rights of the companies they represent. We do not say this in criticism, for such is their duty,—the necessary condition of their places."

The Government in its Brief, page 23, states that the risk of loss was on the buyer during shipment. The purchase contracts expressly provided otherwise. (See Government's Brief pp. 5-8.) Provision that the risk of loss is on the seller until delivery is consistent with title remaining in the seller until delivery.

No reason can be found for not having title in the seller during the shipment. After the enactment of the Transportation Act of 1940, no one thought of claiming that shipments by the Maritime Commission were entitled to land-grant rates. It was stated in the resolution of the Maritime Commission dated December 4, 1942 [R. 74]:

> "Whereas, prior to the entry of the United States into the present war on December 8, 1941, there was no basis for a determination by the Commission as of the time of transportation of any such materials, equipment and supplies that upon completion any particular vessel or group of vessels would be devoted primarily to the purposes of war rather than to the purposes of commerce; . . ."

The Government has at no time claimed land-grant rates on shipments which were made by the Maritime Commission at the time these purchase contracts were made (between June 20, 1941 and November 27, 1941). As stated by the Court [R. 45] "The record here indicates that it was not until December, 1942, that the Maritime Commission thought of claiming land-grant rates" and in its resolution of December 4, 1942, the Maritime Commission claimed land-grant rates only on those shipments title to which passed to the Government after December 8, 1941 [R. 74-75]. It was perfectly natural that in this situation the sellers would follow their normal business practices and the Government would have no reason to request any modification of such practices.

Further, the Government argues on pages 23-24, that as the contractors knew the Government was to have land-grant rates, the parties must have intended title to be in the Government. As mentioned, not even the Government, at the time of purchase, had any thought of claiming land-grant rates on the shipment of the materials purchased. In fact until the last of 1942, the Government paid full commercial rates on shipments for the Maritime Commission.

The real substance of the Government's argument is that it now appears to have been unwise to have provided in these contracts that title should remain in the seller until delivery at destination. As has been mentioned, it was not even known at the time these contracts were made that the Government would make any claim to land-grant rates.

Now that the land-grant question has arisen, the Government would like to make a different contract than it actually made.

The terms of the purchase contract as actually made must be applied and it follows that the title to these shipments was not in the United States at time of shipment.

B. Shipment on Government Bill of Lading Did Not Effect a Change in Title Before Delivery.

The Government contends that even though the original purchase contract provided that title was in the seller until delivery, that this contract was subsequently modified by the issuance of a Government bill of lading and the seller's accepting the bill of lading for use in making the shipment.

This is merely another way of stating the argument heretofore made by the Government that shipment on Government bill of lading resulted in title being in the Government. As has been stated and admitted by the Government, this fact is merely presumptive evidence of title and does not overcome an express provision as to title. It follows that as it does not control title in the first instance, it certainly would not change the status as to title at a later time. If this were not so, no shipment on Government bill of lading could be other than a shipment of Government property. In the case of *Louisville & Nashville Railroad v. United States,* 267 U. S. 395, 69 Law Ed. 678, it was held that in spite of shipment on Government bill of lading title was not in the United States during the shipment, and the shipment was not property

of the United States. Certainly, the Government would not contend that the mere notation on the bill of lading designating the shipping point as the "f. o. b. point named in the contract" changed this situation. In an opinion of the Comptroller General where a notation on the bill of lading showed the destination point as the f. o. b. point, it was stated in opinion reported in 17 Comptroller General Opinions 978, dated May 25, 1938:

> "The insistence that these materials were not property of the United States appears to be rested mainly on the fact that the bills of lading issued for the transportation service have notations indicating that the materials were purchased f.o.b. destination. The question, however, as to when the title to the goods in question passed to the United States is governed by the intention of the parties to the contract of purchase and the mere fact of a notation on the bills of lading in this connection is not controlling on that question."

It is argued at various places by the Government (pp. 17, 22, 32), that shipment on Government bill of lading changed the title provision of the purchase contracts. It is to be noted that each of the purchase contracts provided for shipment on Government bill of lading [R. 27-28, 29, 32, 33]. Therefore, shipment on a Government bill of lading indicates no intention to change the provisions of the purchase contracts.

In several places in the Government's Brief it is claimed or suggested that the Government had complete control of

these goods and could have diverted them to other destinations. (See pages 18, 22 and 25.) For example, see page 25, where it is stated:

> "Any former title reservation was supplanted by transfer to the Government which had complete control and could have diverted the goods, exactly as in the Jones & Laughlin shipments."

In purchase orders MCc(ESP)-1837 and MCc(ESP)-2690 it is expressly provided:

> "The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabrication point [Los Angeles] herein specified and shall not be diverted or reconsigned without permission of the Seller" [R. 33].

The mere notation on a bill of lading as to the f.o.b. point named in the contract does not overcome an express provision in the purchase contract as to title.

The various references by the Government, on page 25 of its Brief, to the Uniform Sales Act as upholding the contention that delivery of goods to the carrier indicates an intention to pass title at that time, are all applicable to situations where the purchase contract has no provision in regard to the time of passage of title. In this case, where the contract had an express provision on this question, the situation is entirely different. There is no question that the express provision of the contract must control over the mere *indicia* of title.

II.

If Title Was Not in the United States at the Time of Shipment, the Government Is Not Entitled to Land-Grant Rates Under the Provisions of Section 321(a) of the Transportation Act of 1940.

The Government argues that even though title of the shipments in question remained in the seller during the shipment, nevertheless, the goods shipped were "property of the United States" within the meaning of Section 321(a).

This contention on the part of the Government is contrary to the long accepted meaning of the phrase "property of the United States" as used in the various land-grant statutes. In the case of *Louisville & Nashville Railroad Company v. United States,* 267 U. S. 395, 69 L. Ed. 678 at 680, it was stated:

> ". . . Under the land-grant acts, the United States was entitled to the reduced rates if the coal, when hauled, was its property. Acts of May 17, 1856, June 3, 1856, and March 3, 1857, 11 Stat. at L. 15, 17, 200, chaps. 31, 41, 103; Acts of April 10, 1869, and March 3, 1871, 16 Stat. at L. 45, 580, chaps. 24, 123; Act of March 3, 1875, 18 Stat. at L. 509, chap. 171; Illinois C. R. Co. v. United States, 265 U. S. 209, 68 L. ed. 983, 44 Sup. Ct. Rep. 485. But the mere use of government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation, and does not give the United States the right of transportation at land-grant rates. See Transportation Involved in Furnishing Articles by Contractor, 20 Comp. Dec. 721, 723."

It was further stated at page 402:

> "The conclusion that the coal furnished the Tonopah was to be delivered at the mine is not sustained

> by the facts found. Under the invitation to bid, proposal and acceptance, delivery was to be made alongside the vessel at Pensacola. The coal was transported on government bills of lading. The United States paid the freight, less land-grant deductions. The use of government bills of lading and the payment of reduced charges by the United States are not sufficient to sustain a finding that the coal was the property of the United States when hauled by appellant. There is nothing to indicate that title passed before delivery at the vessel."

In reaching its decision, the Supreme Court in the *Louisville* case determined whether the particular shipment was "property of the United States" within the meaning of the land-grant acts at that time by determining whether the title to the shipment was in the United States during the time of the shipment.

In *Illinois Central R. Co. v. United States,* 265 U. S. 208, 68 L. Ed. 983, the Court stated the issues of the case as follows:

> "The question in the case is whether, in certain shipments of property for use by the United States, title to the property passed at the place of shipment or at the place of delivery. Or, to state the question another way, whether the shipments while in transit were the property of the United States, and properly transported at land-grant rates, or did not become the property of the United States until after receipt at destination and subject to commercial rates. . . ."

It is clear from the above that the Court considered that whether the shipment was "property of the United States" depended on whether title was in the Government during the shipment.

In the case of *United States v. Galveston, H. & S. A. R. Co.*, 279 U. S. 401, 73 L. Ed. 760, it was held that the Government was not entitled to land-grant rates on the transportation of officers' mounts. The Court stated the contention of the Government, 73 L. Ed. at 761:

> "The United States concedes that it is liable for such transportation; but it insists that applicable statutory provisions and army regulations show that it has a property interest in the horses and the right to require the officers to use them in discharge of their duties; that they are the property of the United States within the meaning of the Land Grant Acts, and that therefore it is entitled to the reduced rates."

The Court further stated at 761 and 762:

> "In Alabama G. S. R. Co. v. United States, 49 Ct. Cl. 522, it was held that when not actually in the service of the United States the men in the National Guard of a state transported upon proper government requisition for participation by authority of the Secretary of War in the encampment, manoeuvers, and field instruction of a part of the regular Army are not 'troops of the United States.' And see United States v. Union P. R. Co., 249 U. S. 354, 63 L. ed. 643, 39 Sup. Ct. Rep. 294. In Oregon-Washington R. & Nav. Co. v. United States, 58 Ct. Cl. 645, the court held that the effects, household goods, etc., and authorized mounts of Army officers on change of stations, are not government property within the purview of such acts. And in Oregon-Washington R. & Nav. Co. v. United States, 255 U. S. 339, 345, 65

L. ed. 667, 669, 41 Sup. Ct. Rep. 329, this court held that the personal baggage of an officer is not property of the United States entitled to transportation at land grant rates.

"We are of opinion that the principle of these decisions is controlling here. The United States demands service from its army officers which requires the use of things furnished by them. But it does not own and, as between it and them, it does not claim to own, hold or have any property rights in the uniforms, manuals, clothes, private mounts or other things by them furnished and used in the service. It would be unreasonable to hold valid the government's claim of ownership asserted merely to secure land grant rates for the transportation of such mounts. The construction contended for is without support and cannot be sustained."

It is clear from the above cases, it has always been held that whether a shipment is "property of the United States" depends on whether or not title of the shipment is in the Government. As title to the shipments in question were not in the Government, land-grant rates are not applicable.

The earlier decisions of the Supreme Court holding that the question whether or not a shipment might be considered "property of the United States" depended on the title of the shipment, must have been accepted by Congress in the enactment of the Transportation Act of 1940 and the same interpretation of the phrase must be followed in construing Section 321(a) of the Transportation Act of 1940.

Conclusion.

Insofar as the District Court held that materials shipped on bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were not "property of the United States" within the meaning of Section 321(a) of the Transportation Act of 1940, the judgment should be affirmed.

Respectfully submitted,

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,

Attorneys for Appellant and Respondent, Pacific Electric Railway Company.